Supreme Court, U.S.

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IN THE

Supreme Court of the United States

HAGGAR APPAREL CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 19 C.F.R. § 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The only parties to the proceeding are the petitioner and respondent as listed in the caption. Petitioner Haggar Apparel Company is now known as Haggar Clothing Company. Petitioner's parent company is Haggar Corporation. No other publicly held company owns 10% or more of petitioner's stock.

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OPINIONS BELOW

The July 27, 2000, opinion of the Court of Appeals for the Federal Circuit, following remand from this Court, is reported at 222 F.3d 1337. See Appendix ("App.") 1a-12a. The July 12, 1996, opinion of the Court of International Trade (App. 13a-28a) is reported at 938 F. Supp. 868. The October 22, 1997, opinion of the Federal Circuit (App. 29a-32a) is reported at 127 F.3d 1460.

JURISDICTION

Haggar Apparel Company's petition for rehearing was denied on October 19, 2000. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, provides that, with respect to:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States . . . .

2. Subsections (b) and (c) of 19 C.F.R. § 10.16 provide as follows:

> (b) Operations incidental to the assembly process. Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> (1) Cleaning;
>
> (2) Removal of rust, grease, paint, or other preservative coating;
>
> (3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;
>
> (4) Trimming, filing, or cutting off of small

amounts of excess materials;

(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;

(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips; and

(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

(c) Operations not incidental to the assembly process. Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202):

(1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;

(2) Cutting of garment parts according to pattern from exported material;

(3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as

showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

STATEMENT OF THE CASE

1. Haggar Apparel Company designs, manufactures, and markets a wide variety of men's apparel products. The apparel products at issue in this case are men's permanent-press trousers, which were assembled in Mexico from fabric manufactured at textile mills in the United States. App. 14a. Permanent-press garments are those that maintain a smooth, wrinkle-free appearance without ironing or pressing, even after they have been washed and worn. *Id.*; J.A. 31.[1] The permanent-press characteristics are achieved in different ways depending on the type of fabric used to make the garments.

For trousers made from a cotton-polyester blend, Haggar had the fabric treated with a chemical resin at textile mills in the United States before shipping the fabric to Mexico for assembly. App. 14a. To achieve permanent-press characteristics, heat must be applied to the fabric. J.A. 33. Thus, after assembly, the completed trousers were pressed and then baked in an oven for 12-15 minutes. App. 14a; J.A. 33. The same permanent-press characteristics could have been achieved without the ovenbaking process, simply by pressing the trousers for an additional two to three minutes. J.A. 57. Haggar found ovenbaking less expensive than

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[1] "J.A." refers to the Joint Appendix filed in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) (No. 97-2044), when the case was first before the Court.

further pressing, however, because the ovenbaking process was automated and involved the use of fully depreciated equipment. App. 23a; J.A. 41-42, 57. After ovenbaking, the trousers were tagged, packaged, and shipped back to the United States. App. 15a.

Haggar also made trousers from all-synthetic fabric. Trousers made from the all-synthetic fabric had to be pressed in order to achieve permanent-press characteristics, but the fabric did not require chemical treatment or ovenbaking. App. 14a. Haggar shipped the all-synthetic fabric to Mexico, where the components were assembled and the trousers were then pressed. After pressing, the trousers were tagged, packaged, and shipped back to the United States. See *id.* at 15a.

2. Upon arrival in the United States, Haggar's trousers were subject to customs duties. Ordinarily, a duty would be imposed on the full value of the imported goods. However, the tariff provisions enacted by Congress provide a partial duty exemption for certain goods that are assembled abroad but whose components were made in the United States. As relevant here, Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, provides that the duty owed on such goods is to be calculated based upon "the full value of the imported article, less the cost or value of [the components made in the United States]," if certain conditions are met. The condition at issue in this case requires that the American-made components sent abroad for assembly not have been "advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." 19 U.S.C. § 1202, subheading 9802.00.80.[2]

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[2] The HTSUS took effect on January 1, 1989. App. 3a n.1. The text of Item 807.00 of the Tariff Schedule of the United States (TSUS), which applied prior to January 1, 1989, is identical to Subheading 9802.00.80.

The Customs Service has promulgated a regulation interpreting the phrase "operations incidental to the assembly process" as used in Subheading 9802.00.80. The regulation attempts to define those operations that may be classified as incidental and those that may not. See 19 C.F.R. § 10.16. As relevant here, that regulation provides: "Any significant process, operation, or treatment other than assembly whose primary purpose is the . . . physical or chemical improvement of a component . . . shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article." *Id.* § 10.16(c). The regulation then provides several examples of operations not deemed incidental to assembly, including the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles." *Id.* § 10.16(c)(4). The regulation also provides several examples of operations that are considered incidental to assembly, such as "sorting, pressing, and folding of assembled articles." *Id.* § 10.16(b)(7).

3. Haggar sought a partial duty exemption for its permanent-press trousers under Subheading 9802.00.80 of the HTSUS, on the ground that the pressing of the all-synthetic trousers, and the pressing and ovenbaking of the cotton-polyester trousers, were operations incidental to the assembly of the garments. The Customs Service granted the exemption for the all-synthetic trousers, but denied the exemption for the cotton-polyester trousers, despite the fact that the method of producing both types of trousers "involve[d] the same assembly and pressing process." App. 14a. The only difference was that the cotton-polyester trousers were ovenbaked instead of given a more-expensive extended pressing.

Haggar paid the required duties and then brought a refund suit in the Court of International Trade, which has exclusive jurisdiction to review protests of classification determinations by the Customs Service. See 28 U.S.C. § 1581(a). Applying the multi-factor test established in *United States* v. *Mast*

Industries, Inc., 668 F.2d 501 (C.C.P.A. 1981), the court concluded that the ovenbaking operation was incidental to the assembly process and thus did not disqualify Haggar's cotton-polyester trousers from the partial duty exemption under Subheading 9802.00.80. App. 25a.

The government attempted to defend the Customs Service's classification of the goods by relying on 19 C.F.R. § 10.16(c). The court declined to apply the regulation, however, because it concluded that "[s]ubsection 10.16(c) conflicts with the plain language" of Item 807.00 of the TSUS (the predecessor to Subheading 9802.00.80 of the HTSUS). App. 26a. The court noted that Item 807.00 "does not prohibit operations which merely impart new characteristics to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the article so long as the operation imparting those characteristics was incidental to assembly." *Id.* at 26a-27a (emphasis omitted). Based on Federal Circuit precedent, the court rejected the government's argument that the customs regulation was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). App. 27a.

4. The government appealed to the Federal Circuit, which has exclusive jurisdiction to review decisions of the Court of International Trade. See 28 U.S.C. § 1295(a)(5). The Federal Circuit affirmed. App. 29a-32a. The court of appeals agreed with the trial court's application of the *Mast* factors, and held that customs regulations relating to tariff classifications are not entitled to *Chevron* deference. *Id.* at 31a.

5. This Court granted the government's petition for a writ of certiorari. 524 U.S. 981 (1998). The government's petition raised two questions: (1) whether customs regulations relating to tariff classifications are entitled to deference under *Chevron*; and (2) if so, whether 19 C.F.R. § 10.16(c) is a reasonable interpretation of the statutory phrase "operations incidental to the assembly process" under

Subheading 9802.00.80. This Court reversed on the first question, holding that the Federal Circuit erred in declining to apply the *Chevron* framework to tariff classification regulations. *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999).

The Court declined to reach the second question on which certiorari had been granted, leaving to the Federal Circuit on remand the task of determining in the first instance "how the regulation at issue fares under the *Chevron* framework." *Id.* at 395. The Court stated that it found this to be a "difficult question," in light of the "substantial arguments" Haggar had raised "challenging the regulation's interpretation of the statutory language as well as the application of the regulation to the particular process and goods at issue here." *Id.* at 394-95. Specifically, with respect to the application of the regulation, the Court noted that the Customs Service had granted a duty exemption for the all-synthetic trousers yet denied an exemption for the ovenbaked cotton-polyester trousers, "notwithstanding the fact that the permapress characteristics could have been achieved on the trousers involved here by pressing them for an additional period of time in lieu of ovenbaking." *Id.* at 395. In addition, the Court noted that the Customs Service sought to apply the regulation's reference to "[c]hemical treatment of components . . . such as . . . permapressing," 19 C.F.R. § 10.16(c)(4), even though "it is undisputed that the chemical resin was applied to the trousers in the United States." 526 U.S. at 395.

6. On remand, the Federal Circuit held that "19 C.F.R. § 10.16(c) is a reasonable interpretation of HTSUS 9802.00.80 (and TSUS 807.00), and that Customs properly applied the regulation in this case." App. 5a. The court of appeals began its *Chevron* analysis by observing that "the Supreme Court has already answered the first question: HTSUS 9802.00.80 is ambiguous for *Chevron* purposes." *Id.* at 6a. The court thus proceeded directly to the second step of *Chevron*'s analysis. But the court viewed its task as limited

to determining only whether the regulation's interpretation of the statutory phrase "operations incidental to the assembly process" was "contrary to the intent of [c]ongress, as divined from the statute and its legislative history." *Id.* at 6a-7a (internal quotation marks omitted). The court upheld the regulation because, in its view, the categorical approach taken by the Customs Service in defining operations not incidental to assembly was not contrary to congressional intent, and use of that approach inevitably required the drawing of fine lines. *Id.* at 9a. The court did not address any of Haggar's other "substantial arguments" concerning the validity of the regulation or the specific categories applied in this case.

Though this Court had specifically highlighted the issue, the court of appeals also made no effort to determine whether the line Customs had drawn between Haggar's "pressing" and "permapressing" operations was arbitrary and irrational. Nor did the Federal Circuit confront the fact (also highlighted by this Court) that the "chemical treatment" referred to in the regulation actually occurred in the United States. The court of appeals instead noted that the ovenbaking process occurred in Mexico, and that this application of heat "causes the chemical change in the fabric, imparting the 'permapress' qualities." *Id.* at 12a. But the court did not explain how ovenbaking could rationally be distinguished from pressing of the all-synthetic trousers, since both processes occurred in Mexico and imparted "permapress" qualities to the garments. The court's observation that the cotton-polyester trousers "left the United States without permapressed qualities . . . [and] returned permapressed," *id.*, was no answer, because that was equally true of the all-synthetic trousers, for which Customs had provided a partial duty exemption under Subheading 9802.00.80.

REASONS FOR GRANTING THE PETITION

This Court previously granted certiorari on the same question presented here: whether 19 C.F.R. § 10.16(c)

reasonably interprets the statutory phrase "operations incidental to the assembly process." Although the Court did not resolve that issue in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999), the Court expressly stated that it found this to be a "difficult question." *Id.* at 395. The Court also directed the Federal Circuit to address Haggar's "substantial arguments" regarding the irrationality of Customs' application of this regulation here, and specifically Customs' distinction between "pressing" and "permapressing" operations. *Id.* at 394-95.

The court of appeals failed to conduct either inquiry. Instead, the court simply addressed whether Customs could reasonably have adopted a category-based approach to classifying those processes that are incidental to assembly. Having decided that Customs could regulate on the basis of categories, the Federal Circuit summarily affirmed the Customs decision below. It therefore never reached the specific and difficult questions raised by Customs' arbitrary application of its regulations, for which this Court specifically remanded.

The Federal Circuit's failure to provide any meaningful analysis of the rationality of Customs' exercise of discretion is not limited solely to this case. In a companion case, *Levi Strauss & Company* v. *United States*, 222 F.3d 1344 (Fed. Cir. 2000), petition for cert. filed January 17, 2001, the court failed to consider not only the irrationality of the application of the categorical scheme to the goods at issue, but also whether the particular subcategory at issue could itself be reconciled with the statute. The *Haggar* and *Levi* cases thus confirm that the Federal Circuit has effectively granted the Customs Service unreviewable discretion both to adopt categories that are not incidental to assembly, and to apply those categories at will. The Federal Circuit's failure to review the agency's exercise of discretion conflicts with this Court's mandate in *Haggar*, with *Chevron*, and with the

court's fundamental obligation to review timely challenges to arbitrary agency action.

If left uncorrected, the decision below will have nationwide impact. The Federal Circuit exercises exclusive appellate jurisdiction over customs classification disputes, and thus is the only appellate forum in which challenges to classification regulations may be heard as a matter of right. That court's refusal to require *any* reasoned explanation from Customs for the categorical lines it has drawn will deprive litigants in customs disputes of the ability to seek redress for arbitrary agency action. Indeed, now that the Federal Circuit turns a deaf ear to questions that this Court has declared are substantial, future litigants have no realistic hope of getting the Federal Circuit to address their comparable claims. The petition should therefore be granted in light of the exceptional importance of the issue raised and the manifest error of the Federal Circuit's holding.

1. In remanding for further proceedings, this Court confirmed that Haggar had raised substantial questions concerning the validity of the agency's interpretation of the statutory language and of its application of the regulation to the goods at issue here. 526 U.S. at 394-95. The lower court's failure to address these questions on remand reflects not only its misreading of the Court's decision in *Haggar*, but an equally fundamental misperception of its crucial obligation to conduct arbitrariness review under step two of *Chevron*.

The two-step test this Court established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has become a familiar part of American administrative law. Under the first step, courts must determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the court "must give effect to the unambiguously expressed intent of Congress," *id.* at 843, by rejecting any administrative interpretation of the statute that is contrary to that intent, *id.* at 843 n.9. However, if the statute "is silent or ambiguous with respect to the specific issue," the

court must proceed to the second step, which requires the court to determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Subsequent cases have made clear that "permissible" in this context is synonymous with "reasonable." See, *e.g.*, *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500 (1998); *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 699 (1991).

The Court's cases have not explicitly defined the circumstances under which an agency's interpretation of a statute, although not contrary to clear congressional intent, may nonetheless be deemed unreasonable. See Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1261 (1997) (noting that the Court has never invalidated an agency's interpretation of a statute under step two of *Chevron*). But the Court provided some guidance on this score in *Chevron* itself. There, the Court stated that when agencies issue regulations to fill gaps left in the statutory scheme, such regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-44. Directing courts to engage in arbitrary-and-capricious review under step two was in line with the Court's pre-*Chevron* cases. In *Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981), for example, the Court held that, when Congress has delegated authority to an agency to interpret statutory terms, a court may not "abdicate review"; rather, the court must ensure that the agency did not exceed its authority and that "the regulation is not arbitrary or capricious." *Id.* at 44. In post-*Chevron* cases, as well, the Court has indicated that determining whether an agency's interpretation is "reasonable" requires an assessment of whether that interpretation is arbitrary or capricious. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741-42 (1996).

The court of appeals clearly departed from established law by failing to engage in any arbitrariness analysis below. As

noted above, the Federal Circuit conceived of its role under *Chevron*'s second step as determining only whether the regulation "was contrary to the intent of [c]ongress." App. 7a (internal quotation marks omitted). That limited review, however, was only half of the equation. Before pronouncing the agency's interpretation of the tariff statute reasonable, the court of appeals was also obligated to assess whether, within those broad parameters, Customs had rationally exercised its discretion to interpret the statute. See *NLRB* v. *United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987). And where, as here, that issue was in doubt, the agency was required to provide a "satisfactory explanation" for drawing the lines as it did. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The court below, however, made no attempt to determine whether the agency's interpretation of Subheading 9802.00.80 was arbitrary or capricious under these standards.

As a result, the Federal Circuit never addressed this Court's specific concerns regarding the rationality of Customs' interpretation of the statutory phrase "operations incidental to the assembly process." For example, the court of appeals failed to require any explanation from Customs for the agency's decision to treat Haggar's pressing of the all-synthetic trousers differently from the ovenbaking of the cotton-polyester trousers, even though both processes were used to impart the same permanent-press characteristics to the garments. The rationality of that distinction was particularly suspect since, as the Court noted, "the permapress characteristics could have been achieved on the trousers involved here by pressing them for an additional period of time in lieu of ovenbaking." *Haggar*, 526 U.S. at 395. Nor did the court of appeals require Customs to address the Court's concern that, although the agency's regulation referred to the "[c]hemical treatment of components" abroad, see 19 C.F.R. § 10.16(c)(4), Customs applied the regulation in this case even though "it is undisputed that the chemical resin

was applied to the trousers in the United States," *Haggar*, 526 U.S. at 395. By failing to address these issues, the court of appeals left Haggar, as well as importers in future cases, at the mercy of Customs' arbitrary interpretation of important tariff provisions.[3]

This case thus raises serious separation of powers concerns. As this Court established in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Mandating deference to an agency's interpretation of the law, as *Chevron* requires, is in considerable tension with this principle. An acceptable balance has been struck under *Chevron* only because courts must still review the rationality of an agency's construction of a statute, and ensure that the agency's construction is consistent with congressional intent. The Federal Circuit has upset that balance, however, by granting the Customs Service free rein to define governing law, without regard to the constraints imposed by Congress and without any meaningful review by the courts.

The Federal Circuit's failure to engage in any form of arbitrariness review under *Chevron*'s second step is in conflict with the approach followed in a majority of the circuits. See *Strickland* v. *Commissioner, Maine Dep't of Human Servs.*, 96 F.3d 542, 547 (1st Cir. 1996); *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999); *Chang* v. *INS*, 119 F.3d 1055, 1060 (3d Cir. 1997); *In re Kaiser*

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[3] The Federal Circuit's failure to scrutinize the rationality of customs regulations is not an isolated occurrence. In *Levi Strauss*, the court engaged in no analysis at all of the regulation's consistency with the statute or its application to the specific stonewashing process at issue there. Similarly, in another post-*Haggar* case, the court failed properly to engage in analysis under *Chevron*'s second step and upheld a regulation that defined the statutory terms "journey" and "originated" in a manner that produced wholly irrational results. See *Princess Cruises, Inc.* v. *United States*, 201 F.3d 1352, 1361 (Fed. Cir.), *cert. denied*, 120 S. Ct. 2741 (2000).

Aluminum & Chem. Co., 214 F.3d 586, 591 (5th Cir. 2000); *Iowa Util. Bd.* v. *FCC*, 219 F.3d 744, 749 (8th Cir. 2000); *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999); *Pharmanex* v. *Shalala*, 221 F.3d 1151, 1154 (10th Cir. 2000); *Cook* v. *Wiley*, 208 F.3d 1314, 1319 (11th Cir. 2000). These courts have expressly stated that, in order to be found reasonable under *Chevron*'s second step, an agency's interpretation of a statute must withstand review under an arbitrary-and-capricious standard. The District of Columbia Circuit is substantially in accord. See, *e.g.*, *American Petroleum Inst.* v. *EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) (noting overlap between *Chevron*'s second step and arbitrary-and-capricious review); *National Ass'n of Regulatory Util. Comm'rs* v. *ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994) (same). See also Kenneth C. Davis & Richard J. Pierce, Administrative Law Treatise § 7.4, at 264 (3d ed. Supp. 2000) (noting "complete overlap" between the analysis required under step two of *Chevron* and arbitrary-and-capricious review under *State Farm*). While the law on this point is not as clear in the Fourth, Sixth, and Seventh Circuits, the Federal Circuit appears to stand alone in its disregard of fundamental *Chevron* principles for step two.

This case is without question the appropriate vehicle for the Court to address the Federal Circuit's failure to apply *Chevron* properly to Customs' decisions. If the Federal Circuit has not applied the correct standard here, where this Court itself pointed out the difficult questions to be confronted, it certainly will not apply the correct analysis under step two of *Chevron* in subsequent cases where a mere litigant raises comparable issues. Unless this Court intervenes now, the decision below will stand as the leading case in the Federal Circuit on the application of *Chevron*'s framework to customs regulations. And given the court's deficient analysis in the companion case below, *Levi Strauss & Co.* v. *United States*, 222 F.3d 1344 (Fed. Cir. 2000), as well as its earlier decision in *Princess Cruises, Inc.* v. *United*

States, 201 F.3d 1352 (Fed. Cir. 2000), see n.3 *supra*, there is no reason to believe the Federal Circuit will correct this error itself.

The Court should grant certiorari here to clarify that the reasonableness test under *Chevron*'s second step requires courts to examine whether an agency has exercised its discretion to interpret a statute in an arbitrary or capricious manner, and to make clear that agencies must adhere to standards of rationality when they interpret statutes no less than when they engage in purely policymaking functions.

2. Despite this Court's express directive that the Federal Circuit consider the "substantial arguments" Haggar had raised "challenging the regulation's interpretation of the statutory language," 526 U.S. at 394, the Federal Circuit simply left most of them unaddressed. It thus failed correctly to resolve the one aspect of step-two analysis that it did undertake: determining whether the Customs Service's regulation was contrary to congressional intent.

Section 10.16 sets forth a general definition of the statutory concept of operations "incidental to assembly," and identifies two types of non-incidental operations: those whose "primary purpose is the fabrication, completion, physical or chemical improvement of a component," and those that are "not related to the assembly process." 19 C.F.R. § 10.16(c). The regulation then lists several specific operations that are deemed not to be incidental to assembly under the regulation, and identifies "[c]hemical treatment of components or assembled articles to impart new characteristics, such as . . . permapressing" as one such operation. *Id.* § 10.16(c)(4). This regulation plainly conflicts with congressional intent for three reasons.

First, in addressing the only argument that it did confront relating to congressional intent, the Federal Circuit erred in holding that the statute permits the Customs Service to identify, in advance, certain operations that intrinsically are

"not incidental to assembly," no matter what the facts surrounding a particular assembly process or incidental operation may be. That is not the inquiry that Congress commanded. The statute asks not that an operation be compared to "assembly" in the abstract, but that it be compared to "*the* assembly *process*." 19 U.S.C. § 1202, subheading 9802.00.80 (emphasis added). Because each article has its own assembly process, this language can meaningfully be read to refer *only* to the specific assembly process used to create the article whose duty is in question. That the statute requires a comparative inquiry into the significance of a given operation in light of a particular assembly process, and not a classification ex ante, is further evidenced by the plain meaning of the term "incidental," which compels a comparative inquiry. See, *e.g.*, *Black's Law Dictionary* 762 (6th ed. 1990) (defining "incidental" as "[d]epending upon or appertaining to something else as primary"). Given this language, the processes that Congress identified in the statute can reasonably be understood only as examples likely to be incidental to any assembly process, not as a license to ignore the comparative inquiry otherwise mandated by the statutory language.

Second, even if the Customs Service could permissibly adopt a categorical approach in defining operations not considered incidental to assembly, the agency erred by using criteria for classifying permapressing operations that conflict with the statute. Thus, the regulation classifies as non-incidental those operations whose "primary purpose is the . . . chemical improvement" of a component. 19 C.F.R. § 10.16(c). The "primary purpose" criterion sweeps far too broadly, however, because – by definition – *any* operation that is not intended to assemble an article (and hence is not part of the assembly process) will have as its "primary purpose" some object other than assembly. Yet the statute plainly reveals that Congress intended to allow a duty

allowance so long as the operation, though not part of the assembly process, was incidental to it.

Third, the classification itself is also impermissible because it excludes from consideration operations whose primary purpose is the "chemical improvement" of a component of the article. Subheading 9802.00.80 of the HTSUS, however, permits a duty allowance for American-made products assembled abroad that "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." These words plainly indicate that operations which do, in fact, advance the value of a product or improve its condition do not, for that reason alone, preclude an allowance. Rather, the ultimate question is whether such improvement came about through operations that are incidental to the assembly process. As the Federal Circuit had previously recognized, "item 807.00 logically assumes that there has been an advancement or improvement, but limits the extent of the advancement in value or improvement in condition to that which is brought about solely by the act of assembly or operations incidental thereto." *Miles* v. *United States*, 567 F.2d 979, 983 (C.C.P.A. 1978).

The examples in subsection 10.16(c)(4) of operations whose primary purpose is the "chemical improvement" of an article are thus impermissible. To impart new characteristics through chemical treatment is simply one way to improve the condition or advance the value of an article. Thus, to identify an operation, such as permapressing, that imparts new characteristics barely begins the statutory inquiry; it does not say anything about whether that operation was "incidental to the assembly process." Moreover, the Customs Service has provided no explanation -- because the court of appeals never required one -- of what separates the improvements listed in subsection (c)(4) from those that are allowed.

What the Customs Service meant by the other general criterion for classifying non-incidental processes – those which are "not related to the assembly process," 19 C.F.R. § 10.16(c) – is not clear. But that criterion provides no additional support for the permapressing regulation. The only factor mentioned in the regulations that would distinguish "permapressing" from "pressing" (which is related to assembly under the regulations) is that permapressing involves a "[c]hemical treatment" that is intended "to impart new characteristics," *id.* § 10.16(c)(4), and thus has as its "primary purpose" the "chemical improvement" of the article, *id.* § 10.16(c). Thus, at least for "permapressing," the regulation's second, general criterion collapses into the first, plainly invalid criterion.

3. Finally, had the court of appeals addressed the difficult issues identified by this Court with respect to the application of these regulations to Haggar's goods, it could not have affirmed the agency's decision. As this Court previously noted, the real issue here is not "permapressing," as specified in the regulation, because the most significant step in the permapressing process – chemical treatment – occurred in the United States. App. 14a; J.A. 37-38. The only permapressing step that occurred abroad was curing – the application of heat through pressing and ovenbaking. But it is clear that curing alone is not enough to make the permapressing regulation applicable, because it is undisputed both that Customs granted a duty allowance on Haggar's all-synthetic trousers, and that these pants were cured by the pressing done abroad. J.A. 33. If curing the all-synthetic trousers is an operation incidental to assembly, then curing the cotton-polyester trousers should be so, too.

If there is any issue here, then, it is whether the use of ovenbaking in addition to pressing meaningfully distinguishes the curing operation used for cotton-polyester fabric from the pressing operation used to cure all-synthetic fabric. Any attempt to analogize "ovenbaking" to the "chemical treat-

ments" listed in 19 C.F.R. § 10.16(c)(4), however, would be wholly arbitrary. As noted above, it is plain that Customs does not regard applying heat to fabric in order to impart new characteristics as a "chemical treatment," because it granted a duty allowance for the all-synthetic trousers that were pressed abroad in order to achieve the performance characteristics associated with permanent press.

Indeed, if any regulation speaks to the issue, it is the regulation that specifically identifies "pressing" as an operation incidental to the assembly process. See *id.* § 10.16(b)(7). Under the Customs Service's categorical approach, any pressing operation that occurs after assembly should be deemed incidental. The post-curing operation that begins with pressing and is completed with ovenbaking, however, could be accomplished just as effectively – although more expensively – simply by pressing the pants for two or three extra minutes, and forgoing ovenbaking altogether. J.A. 41-42, 57. Thus, Customs has never explained why it is rational that a more expensive curing process (extended pressing) would automatically be deemed incidental to assembly, but a less expensive curing process (pressing plus ovenbaking) is not – even though each imparts the identical new characteristics and improved condition to the garment. This is precisely the sort of irrational distinction that renders an agency's interpretation of a statute arbitrary and capricious under step two of *Chevron*.

4. The Federal Circuit's decision to immunize from arbitrariness review the Customs Service's selection and application of its regulations has enormous practical importance for implementation of the Nation's tariff laws. The Federal Circuit has exclusive jurisdiction to review decisions of the Court of International Trade, which in turn has exclusive jurisdiction over classification disputes. See 28 U.S.C. §§ 1295(a)(5), 1581(a). The Federal Circuit's rulings on the validity of customs regulations thus have binding effect nationwide. Furthermore, cases involving challenges to

classification regulations will always proceed to step two under *Chevron*'s framework. For in classification cases, Congress has never addressed the "precise question at issue," *Chevron*, 467 U.S. at 842; the precise question is which tariff classification applies to the specific merchandise at issue. As a result, the Federal Circuit will repeatedly be called upon to apply step-two analysis in its role as essentially the sole arbiter of claims that the Customs Service has interpreted tariff classification provisions irrationally. As demonstrated above, however, the Federal Circuit has "abdicated review" of such claims, see *Schweiker*, 453 U.S. at 44, and only this Court can correct that error.

The Federal Circuit's failure to conduct arbitrariness review in this context could have even greater significance depending on the Court's ruling in *United States* v. *Mead Corp.*, No. 99-1434 (U.S. argued Nov. 8, 2000). In *Mead*, the government has argued that *Chevron* deference is owed not only to formal regulations promulgated by the Customs Service, but also to classification rulings issued by the agency in individual cases. According to the government's own estimates, the Customs Service issues more than one thousand such rulings each year. U.S. Brief at 38 n.26, *United States* v. *Mead Corp.*, No. 99-1434 (U.S. filed Feb. 29, 2000). Thus, if the Court accepts the government's argument in *Mead*, the Federal Circuit's misapplication of *Chevron* will effectively leave all importers who are subjected to irrational classification rulings without an appellate forum in which to obtain meaningful review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 17, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL CO.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

July 27, 2000

Rehearing and Rehearing En Banc
Denied Oct. 19, 2000

Before NEWMAN, MICHEL, and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

Upon remand from the United States Supreme Court, *see United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999), defendant United States seeks reversal of the United States Court of International Trade's determination that plaintiff Haggar Apparel Co.'s imported articles qualified for the partial exemption from import duties specified in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, codified at 19 U.S.C. § 1202 (1994). *See Haggar Apparel Co. v. United States*, 938 F.Supp. 868, 874-75 (1996). Because the imported goods are disqualified from the partial exemption by application of 19 C.F.R. § 10.16(c), which we hold to be a reasonable

interpretation of the governing statute, we reverse the judgment of the Court of International Trade and remand with instructions to enter judgment in favor of the United States.

I

Haggar Apparel Co. ("Haggar") designs, manufactures, and markets apparel for men. This dispute arises from a refund proceeding for duties imposed by the United States Customs Service ("Customs") on men's pants shipped by Haggar to the United States from an assembly plant in Mexico. The fabric used to make the pants had been cut to shape in the United States and then shipped to Mexico, along with the thread, buttons, and zippers necessary to assemble the garments. The pants were assembled in Mexico, and later shipped back to the United States.

While in Mexico, however, the pants were "permapressed" at the Mexican plant. Permapressing, the parties agree, is a process designed to maintain a garment's crease and to avoid other creases or wrinkles from appearing through use. While there are various ways that permapressing may be accomplished, the pants in question were constructed of fabric that had been treated in the United States with a chemical resin. After assembly, the pants were baked in an oven at a facility in Mexico just prior to being shipped back to the United States; the baking activated the chemical resin and imparted the permapress qualities to the garments.

Upon import to the United States, Customs determined that the permapressing operation took the pants outside of the classification of Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides a partial exemption from otherwise-applicable duties. In relevant part, Subheading 9802.00.80, 19 U.S.C. § 1202, is limited to:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.[1]

Customs has promulgated a regulation, 19 C.F.R. § 10.16(c) (1998), interpreting the "operations incidental to assembly process" statutory language used in the HTSUS:

> *(c) Operations not incidental to the assembly process.* Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> . . .
>
> (4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles. . . .

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[1] The HTSUS became law on January 1, 1989, replacing the provisions of the former Tariff Schedule of the United States ("TSUS"). *See* 19 U.S.C. § 3004. Item 807.00 of the TSUS, the previous statute which governs some of the shipments at issue in this case, is identical to HTSUS 9802.00.80.

The regulation was adopted in 1975 by the Commissioner of Customs, after notice-and-comment rulemaking. *See* 39 Fed. Reg. 24651 (1974) (proposed regulation); 40 Fed. Reg. 43021 (1975) (final regulation).

Pursuant to section 10.16(c)(4), which specifically lists "permapressing" as an example of operations which fail to meet the requirements of HTSUS 9802.00.80, Customs denied the exception to duty. Haggar challenged the denial of its protest against such classification by filing this suit in the Court of International Trade. *See* 19 U.S.C. § 1515 (1994). (establishing protest and review procedures for Customs classification decisions).

The Court of International Trade concluded, pursuant to the multi-factor test established by this court's predecessor in *United States v. Mast Industries, Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (1981), that the permapressing operation was incidental to the assembly process and thus did not disqualify the pants from favorable treatment under HTSUS 9802.00.80. *See Haggar Apparel Co. v. United States*, 938 F.Supp. 868, 875 (CIT 1996). The court rejected Customs' contention that 19 C.F.R. § 10.16(c) controlled, finding that the regulation "conflicts with the plain language" of the HTSUS, and noting that the Federal Circuit had, in a series of prior cases, *see e.g.*, *General Motors Corp. v. United States*, 976 F.2d 716, 718 (Fed.Cir.1992), either ignored or discounted the regulation. The court also rejected Customs' argument that the regulation was entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Haggar Apparel*, 938 F.Supp. at 875.

Customs appealed to this court, which declined to consider the regulation under the *Chevron* framework, and affirmed the Court of International Trade. *See Haggar Apparel Co. v. United States*, 127 F.3d 1460, 1462 (Fed.Cir.1997). Customs then petitioned for a writ of certiorari to the Supreme Court,

which was granted. *See United States v. Haggar Apparel Co.*, 524 U.S. 981, 119 S.Ct. 30, 141 L.Ed.2d 790 (1998). The Supreme Court vacated this court's judgment, holding that HTSUS 9802.00.80 is ambiguous, for purposes of *Chevron* analysis, thereby requiring courts to defer to Customs regulations manifesting a reasonable interpretation of the statute. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 391-92, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999). The Court, however, declined to consider whether 19 C.F.R. § 10.16(c) was a reasonable interpretation of the "operations incidental to the assembly process" provision of HTSUS 9802.00.80, reasoning that such arguments were better presented to this court in the first instance. *See* 526 U.S. at 395, 119 S.Ct. 1392. Accordingly, the case was remanded for further proceedings. *See id.*

Upon remand, we ordered additional briefing and oral argument, *see Haggar Apparel Co. v. United States*, 1999 WL 798028 (Fed.Cir. Aug.20, 1999), and now hold that 19 C.F.R. § 10.16(c) is a reasonable interpretation of HTSUS 9802.00.80 (and TSUS 807.00), and that Customs properly applied the regulation in this case.

II

Regulations promulgated pursuant to rulemaking authority granted to administrative agencies are analyzed under the two-step procedure established in the Supreme Court's *Chevron* decision:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [However,] [i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is

> whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43, 104 S.Ct. 2778. In this case, the Supreme Court has already answered the first question: HTSUS 9802.00.80 is ambiguous for *Chevron* purposes. *See* 526 U.S. at 394, 119 S.Ct. 1392. Thus, our task is to "decide, not whether the . . . regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mut. Ins. Co., v. Commissioner*, 523 U.S. 382, 389, 118 S.Ct. 1413, 140 L.Ed.2d 542 (1998).

A

In conducting the second half of the *Chevron* analysis, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. 2778 (*citing FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 91 L.Ed. 136 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-81, 41 S.Ct. 577, 65 L.Ed. 1052 (1921)). Instead, our inquiry is confined to the question of whether the agency's interpretation of the statute is "inconsistent with [the] statutory mandate or . . . frustrate[s] the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983). That is, we have refused to defer to an agency interpretation of a statute, as

expressed in duly-promulgated regulations, only when such an interpretation was "contrary to the intent of congress, as divined from the statute and its legislative history." *Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 925 (Fed.Cir.1994) (refusing to grant deference to regulations contrary to statutory intent); *see United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961) ("[W]e should not disturb [the agency interpretation] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."); *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed.Cir.1997) (refusing to grant deference where agency regulation was at odds with the statutory language).

B

Haggar presents two arguments as to why, in its view, 19 C.F.R. § 10.16(c) is not entitled to *Chevron* deference. First, it argues that the clear language of HTSUS 9802.00.80 excludes any interpretation of "operations incidental to the assembly process" that requires a comparison of the "effect" that a process has on the article. Second, Haggar suggests that Customs' regulatory position is merely one of convenience, conjured up for litigating purposes. We take these arguments in turn.

Haggar's statutory argument is that HTSUS 9802.00.80 requires what it calls a "comparative analysis of the operation itself to the assembly process." Appellee's Brief, at 26. The regulation, argues Haggar, replaces the proper analysis with one concerned with the relative effect of the operation on the article. *See id.* Customs responds by arguing that the regulation makes a choice in favor of a *qualitative* analysis of the effect of the operation on the article, as opposed to a *quantitative* analysis of the significance of the operation in relation to the assembly

process. Customs argues that the terms of the subheading support either a qualitative or quantitative line-drawing exercise, and that Customs, exercising legitimate agency policymaking discretion, has permissibly chosen the qualitative line. We agree.

There is little doubt that the statute permits the so-called "categorical" or "qualitative" analysis adopted by Customs. Indeed, far from excluding it, by listing exemplars, "cleaning, lubricating and painting," the statutory language appears to actually contemplate the imposition of a category-driven analysis. HTSUS 9802.00.80. The legislative history, by again listing categories and examples of the types of operations thought to be "incidental to the assembly process," fails to prohibit the approach adopted by Customs in section 10.16(c). H.R.Rep. No. 89-342, 89th Cong., 1st Sess. 49 (1965) (identifying "incidental" operations as "remov[ing] rust," "remov[ing] grease," and "add[ing] lubricants").

When Customs made the decision to adopt a categorical approach, it necessarily was required to make refined judgments about which kinds of operations fall on the side of "incidental to the assembly process," and which do not. For example, even with the statutory painting exemplar, Customs has decided that some kinds of painting are "incidental," and others are not, the distinction in the regulation being whether the paint operation is primarily for preservative or for decorative purposes. *Compare*, *e.g.*, 19 C.F.R. § 10.16(b)(3) (listing "[a]pplication of preservative paint or coating, including preservative metallic coating . . ." as incidental to the assembly process) *with* 19 C.F.R. § 10.16(c)(3) (listing "[p]ainting primarily intended to enhance the appearance of an article or impart distinctive features or characteristics" as *not* incidental to the assembly process). So, too, does the regulation distinguish varieties of pressing: some forms of pressing have been adjudged by Customs to be incidental to the assembly process, and others—such as permapressing—

have been categorized by Customs to fall outside activity incidental to the assembly process. *Compare* 19 C.F.R. § 10.16(b)(7) (listing "[f]inal calibration, testing, marking, sorting, pressing, and folding of assembled articles" as incidental) *with* 19 C.F.R. § 10.16(c)(4) (listing "[c]hemical treatment . . . such as . . . permapressing" as *not* incidental).

We think that the kind of line-drawing Customs has exercised in its regulation is inevitable, and even necessary, once Customs embarks on a categorical approach to resolution of the statutory ambiguity. At the margins of any judgment call, reasonable minds may differ as to the judgment reached. Such is the natural consequence of regulatory line-drawing, much as the natural consequence of judicial line-drawing will permit of marginal dispute. But that is not to say that the line-drawing exercise lacks reason or is arbitrary. When *Chevron* applies to a fact situation, the regulator supplants the judge to decide in the first instance whether a fact circumstance falls within or without the law. The subsequent judicial inquiry under *Chevron* in this case is whether the agency has selected a "reasonable interpretation of the statutory phrase 'operations incidental to the assembly process.' " *Haggar Apparel*, 526 U.S. at 394, 119 S.Ct. 1392.

It may well be, as Haggar and the *amicus* argue, that a more generally quantitative approach—directly comparing the operation with the overall assembly process—is a better way to address the question posed by HTSUS 9802.00.80. In essence, Haggar argues that a test derived from the combination of quantitative and qualitative factors outlined in *United States v. Mast Industries*, 69 C.C.P.A. 47, 668 F.2d 501, 505 (1981), is "more faithful" to Congressional intent. But any analysis of what approach is "better" under the circumstances or (arguably) "more faithful" to Congressional intent would require this court to intrude upon the agency's mandate to reconcile conflicting policy goals in matters in which it has been delegated authority to implement the intent

of Congress. *See Haggar Apparel*, 526 U.S. at 387, 119 S.Ct. 1392 (noting statutory delegation to the Secretary of the Treasury and to the Commissioner of Customs, respectively); *see also Chevron*, 467 U.S. at 844-45, 104 S.Ct. 2778 (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943)); *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 73 S.Ct. 287, 97 L.Ed. 377 (1953); *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *Republic Aviation Corp. v. National Labor Relations Bd.*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); *National Labor Relations Bd. v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). While this court may have chosen a different approach were we not required to defer to reasonable agency interpretations, *see Mast Indus.*, 668 F.2d at 505, or if the question had arisen in a solely judicial proceeding, *see Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. 2778, we cannot, consistent with well-settled principles of deference to agency interpretations of statutes they administer, hold that the regulations are contrary to congressional intent, as embodied in HTSUS 9802.00.80 and its legislative history. *Cf. Oshkosh Truck*, 123 F.3d at 1481; *Muwwakkil*, 18 F.3d at 925. Therefore, *Mast Industries*, an otherwise quite reasonable analytic tool, must yield to the language of Customs' regulation when imported articles reasonably fall within one of the regulatory categories expressed in 19 C.F.R. § 10.16(c).

Haggar also argues that Customs is adopting the position set forth in 19 C.F.R. § 10.16(c) solely for the purposes of litigation, thereby disqualifying the interpretation for deference under a *Chevron* analysis. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (declining to defer to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). We reject

this contention. Prior to the Supreme Court's decision in *Haggar Apparel*, the law of this circuit was that "neither this court nor the Court of International Trade defers to Customs' interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]." *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed.Cir.1997); *see also Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed.Cir.1997) (holding that no *Chevron* deference applies to classification decisions). Under these conditions, and given that *Mast Industries* was the leading precedent on the question presented here, it is unsurprising that Customs would tailor its legal arguments to this court and to the Court of International Trade accordingly. This, however, does not mean that Customs' classification in this case, based upon the precise language in 19 C.F.R. § 10.16(c), is "wholly unsupported" by official agency actors. *Bowen*, 488 U.S. at 212, 109 S.Ct. 468 ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question."). Indeed, it would seem perverse for this court—after being overruled by the Supreme Court—to adopt the position that agency arguments seeking to implement the Court's guidance are insupportable because of this court's earlier adherence to an incorrect legal principle. Customs' interpretation of HTSUS 9802.00.80, as expressed in 19 C.F.R. § 10.16(c), is reasonable and is accordingly entitled to judicial deference.

III

Our final question is whether Customs was correct in classifying the permapressing conducted on the pants in Mexico as an "operation not incidental to the assembly process." 19 C.F.R. § 10.16(c). The parties do not dispute the material facts concerning the imported articles. As noted above, the fabric was chemically treated in the United States, and then oven-baked after assembly in Mexico to impart the

"permapressed" qualities. Accordingly, this analysis resolves to a question of whether Customs has properly applied its regulation to the articles at issue.

We have little trouble concluding that Customs properly applied its regulation in this case. Section 10.16(c)(4) specifically lists "permapressing" as a category of operations that are not "incidental to the assembly process." Further, it is conceded by Haggar that the oven-baking—which causes the chemical change in the fabric, imparting the "permapress" qualities—occurred only in Mexico. The pants left the United States without permapressed qualities; they returned permapressed. Customs did not err in applying section 10.16(c) to the goods in question.

CONCLUSION

Customs' interpretation of HTSUS 9802.00.80, 19 U.S.C. § 1202, as found in 19 C.F.R. § 10.16(c), is reasonable and thus entitled to judicial deference. Further, Customs' application of section 10.16(c) to the permapressing operation conducted on Haggar's imported articles in this case is not incorrect. We therefore conclude that Customs' determination that the pants at issue do not qualify for the partial exception from duty allowed by HTSUS 9802.00.80 (and, in prior years, TSUS 807.00) must be sustained. The Court of International Trade's judgment to the contrary is accordingly reversed, and the case is remanded with instructions to enter judgment in favor of the United States.

COSTS

No costs.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

No. 93-06-00343

Slip Op. 96-110

HAGGAR APPAREL COMPANY,

Plaintiff,

v.

UNITED STATES,

Defendant.

July 12, 1996

OPINION AND JUDGMENT ORDER

DiCARLO, Chief Judge:

Plaintiff, Haggar Apparel Company challenges the denial of protests filed pursuant to section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515 (1988). Haggar contends the United States Customs Service erroneously denied a duty allowance for fabric components manufactured in the United States and shipped to Mexico for assembly into men's pants. Jurisdiction is proper under 28 U.S.C. § 1581(a) (1988). The court finds the merchandise in question is entitled to a duty allowance.

BACKGROUND

The imported merchandise consists of men's pants assembled in Mexico from components manufactured in the United States. (Stip. Facts ¶¶ 9, 43.) Haggar markets these pants under the "Presstige" name. The most important performance characteristics of Presstige pants are crease retention and seam and surface flatness; the pants are "wash and wear" garments. (Tr. at 11-12, 40; Stip. Facts ¶¶ 18-19.)

Haggar achieves its performance requirements by using a "pre-cured," "post-cured," or pure synthetic fabric. (Stip. Facts ¶ 18.) Curing involves the application of heat to fabric treated with resin. Under the pre-cured method, resin and heat are both applied at the textile mill; Haggar purchases the fabric, cuts it to shape, assembles the components, and presses the completed garment. (Stip. Facts ¶ 20; Tr. at 12.) Under the post-cured approach, Haggar purchases resin-treated fabric from the mill, cuts, assembles, and presses the garment, and bakes it in a curing oven. *Id.* Both the pre-cured and post-cured methods use fabric of a cotton-synthetic blend, which is typically sixty percent cotton and forty percent polyester. (Stip. Facts ¶ 9; Tr. at 12.) Presstige pants made from a pure synthetic fabric require pressing, but do not require resin treatment or baking. (Tr. at 43.)

All methods for producing Presstige pants involve the same assembly and pressing process. *Id.* at 13. The only difference occurs after pressing. *Id.* In the post-cured method, the pants are loaded on an oven conveyer, baked, and unloaded from the conveyer. Improper pressing of the garment prior to the baking process will result in the product being sold as a "second," as proper pressing is essential to crease retention and surface flatness. (Stip. Facts ¶ 41.) In addition, a crease defect cannot be reversed after oven-baking. *Id.*

The garments at issue are Model 245 Presstige pants imported by Haggar in 1988 and 1989. (Stip. Facts ¶ 36;

Haggar's Customs Protest at 3-4.) These pants were made from fabric style 2010, which is a post-cured fabric comprised of sixty percent combed cotton and forty percent fortrel polyester. (Stip. Facts ¶ 39.) The fabric and other components, such as buttons, thread, zippers, and trim items, were manufactured in the United States. *Id.* ¶¶ 47-50. Haggar cut the resin-treated fabric to shape, and exported the fabric and remaining components to Mexico, where they were assembled into pants by Haggar's wholly owned subsidiary, Haggarmex. *Id.* ¶¶ 9, 43-52. Following assembly, pressing, and baking, Haggar attached hangtags and tickets to the pants and packaged and shipped them to the United States. (*Id.* ¶ 52; Tr. at 153-154.)

Upon importation, Haggar sought a duty allowance for pre-1989 entries under item 807.00 of the Tariff Schedule of the United States [hereinafter "TSUS"], and for the remaining entries under subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States [hereinafter "HTSUS"]. Item 807.00, Subpart B, Part I, Schedule 8, TSUS (1987); Subheading 9802.00.80, Chapter 98, Section XXII, HTSUS (1987) (implemented into law on Jan. 1, 1989, pursuant to 19 U.S.C. § 3004 (1988)). Customs denied a duty allowance for the post-cured, cut-to-shape fabric components, but granted the duty allowance for all other components produced in the United States. For the post-cured fabric Customs assessed duties at the rate of 16.5 percent *ad valorem* under TSUS item 381.62.40, and 17.7 percent *ad valorem* under HTSUS subheading 6203.42.40. (Stip. Facts ¶ 11.)

DISCUSSION

Customs is entitled to a presumption of correctness as to its factual determinations. *See* 28 U.S.C. § 2639(a)(1) (1988) (presumption); *see also Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed.Cir.1995) (limiting presumption to factual determinations). Plaintiff bears the burden of

proving that Customs' determination is incorrect. 28 U.S.C. § 2639(a)(1).

Item 807.00(c) of the TSUS affords domestic goods exported for purposes of assembly a partial duty allowance upon re-entry into the United States. To qualify under item 807.00(c), fabricated components of the United States assembled abroad must not be advanced in value abroad outside of assembly and operations incidental to the assembly process. Item 807.00(c), TSUS. Item 807.00 provides:

> 807.00 Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00, TSUS. Pursuant to item 807.00, Customs assesses a duty upon eligible merchandise based "upon the full value of the imported article, less the cost or value of such products of the United States." *Id.* The HTSUS provides an identical exemption under Subheading 9802.00.80.

The parties do not challenge that the imported merchandise was advanced in value or improved in condition abroad. Further, they agree that the articles were exported in condition ready for assembly without further fabrication and that the articles have not lost their physical identity. (Stip. Facts ¶¶ 44-45.) Therefore in determining whether the components qualify for an item 807.00 trade allowance, the dispositive issue is whether ovenbaking is an operation incidental to assembly. To answer this question, the court

turns to the Federal Circuit's decision in *United States v. Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A.1981).

I. The Mast Factors

To determine whether button-holing and pocket-slitting operations were incidental to assembly of women's pants, the court in *United States v. Mast* examined the following factors:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor."
>
> (2) Whether the operations in question were necessary to the assembly process. . . .
>
> (3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. The *Mast* court also indicated a fourth consideration: "whether economic or other practical considerations dictate that the operations be performed concurrently with assembly." *Id.* at n. 7. These factors are not exhaustive, and all factors may not be relevant in each case. *General Motors Corp. v. United States*, 976 F.2d 716, 719-20 (Fed.Cir.1992). Nonetheless, the most basic question—whether such operations are of a minor nature incidental to the assembly process—remains the focus of the court's inquiry.

(A) Cost Comparisons

The first prong of the *Mast* comparisons examines whether the challenged operation constitutes a significant proportion of the total assembly process. To make this determination, the court must first define the scope of the challenged operation, because in making the cost determination, the court must weigh the expense and time costs of the challenged operation against the cost of assembly. According to plaintiff, the

court should compare only ovenbaking against total assembly costs. (Haggar's Post Trial Br. at 1-2.)

Defendant argues the court must compare all non-assembly costs against only pure assembly expenses. (Def.'s Post Trial Br. at 2-3.) To accomplish this task, defendant first contends that operations included on the assembly side of the *Mast* comparisons are solely those operations which encompass the joinder of two solids. *Id.* at 16 & n. 10. Defendant argues that, at a minimum, the court must exclude *all* non-joinder operations, including minor chopping and trimming operations, from the assembly side of the *Mast* comparisons. *Id.* at 16-17.

Second, defendant contends the court must combine *all* non-joinder operations which were excluded from the assembly side of the *Mast* comparisons for comparison against pure assembly costs in order to ascertain whether the challenged operations were more than minor improvements, and therefore, not incidental to assembly. *Id.* According to defendant, failing to combine all non-joinder costs for comparison against pure assembly costs would result in a piecemeal analysis that would undermine "item 807.00 by allowing major and significant operations to be broken down to [a] point where each step could be called minor." *Id.* at 17 (quoting *General Motors*, 976 F.2d at 720). Defendant contends this court in *Surgikos, Inc. v. United States*, 12 Ct. Int'l Trade 242, 245, 1988 WL 24664 (1988) similarly combined all non-assembly operations for comparison against pure assembly operations in determining whether the challenged operations were minor and, therefore, incidental to assembly. *Id.* at 17-18.

The court disagrees with defendant's readings of *General Motors* and *Surgikos*. Neither decision demands that *all* non-joinder operations must be combined for comparison against only pure assembly functions. The Federal Circuit in *General Motors* disagreed with the lower court's "piecemeal

analysis" because the lower court improperly sought to separate the various components of a single process—coating operations during automobile assembly—that should have been considered together. 976 F.2d at 720. The Federal Circuit determined that isolating the various components of the coating operation for an item 807.00 allowance would have allowed importers to argue that each component of the challenged operation was minor, even though the operation as a whole was a significant process, and therefore not incidental to assembly. *Id. General Motors*, however, did not mandate combining *all* "non-joinder" functions with the coating operations when comparing expense and time costs against the cost of the affected components, and the duration of assembly, as defendant now urges. If this were the case, the Federal Circuit would have also grouped the other non-joinder processes including water testing, detail work, inspections, wheel alignment, and final drive tests with the coating operations in its *Mast* calculations. *See id.* at 717-18 (listing non-assembly operations).

Surgikos also fails to support defendant's position. *Surgikos* concerned the assembly of surgical sheets assembled in Mexico. Although the court in *Surgikos* did weigh the only two nonassembly operations—fenestration (creating a rectangular opening in the sheet) and finish folding (functional folding to maintain antiseptic conditions)—against the pure joinder operations, Customs had challenged *both* fenestration and finish folding as nonincidental to assembly; the joinder of the surgical sheets was the only remaining operation. 12 Ct. Int'l Trade at 243-44. Customs, by challenging *all* nonassembly operations as not being incidental to assembly, necessarily mandated that the court compare all nonassembly operations against pure assembly. The issue of whether all nonassembly operations must be weighed against pure assembly, however, was not before the court. The court therefore does not read *Surgikos* as broadly as defendant urges.

The court finds that the minor chopping, handling and trimming operations are not merely incidental to assembly, but are so integral to the process as to merge with it. (*See* Court's Findings, Tr. at 511) (noting that such processes are related to assembly and may also be part of assembly); *see also General Instrument Corp. v. United States*, 499 F.2d 1318, 1319-21 (C.C.P.A.1974) (finding spooling, shaping & machine pressing, cement coating, cutting, stripping, and weaving of magnet and lead wire exported from the United States to Taiwan where wire was wound into coils and cable harnesses as constituting assembly for purposes of item 807.00). These minor operations include placing a notch into the zipper to facilitate the next assembly step, minor trimming of loose threads, simultaneous sewing and cutting of the fly lining, the cutting apart of bands (fabric belt encircling waist) & separation of excessive band lining, the sorting and placing of belt loop components together on a crimping machine to bond the components together, as well as certain supply and handling operations and various manipulations of the fabric so as to make further assembly more efficient. (Tr. at 128-40.) The court, therefore, rejects defendant's interpretation of assembly as purely the joinder of two components as overly restrictive.

The question remains whether pressing is part of the challenged operation compared against assembly. Haggar contends that the challenged operation consists solely of ovenbaking. (Haggar's Post Trial Br. at 1-2; Haggar's Post Trial Reply Br. at 9.) According to Haggar, pressing could not be part of the challenged operation because Customs has considered pressing by itself to be minor and incidental to assembly under item 807.00. *Id.* at 11. However, pressing is necessary to further the curing process. (*See* Stip. Facts ¶ 42) ("the post-curing process used on the [pants in issue] was achieved by pressing and ovenbaking.") Although in a strict sense, pressing is not part of curing, as the actual heat-induced transformation of the fabric is performed during

oven-baking, pressing is integrally related to Haggar's purpose in conducting the curing process, namely to develop crease retention and greater surface and seam flatness in its garments. (Stip. Facts ¶ 19; Tr. at 44.)

This decision is consistent with the decision of the Federal Circuit in *General Motors*. In *General Motors*, the Federal Circuit rejected the lower court's delineation of the challenged painting operation as too narrow, finding "that all coating operations performed upon the disputed components . . . must be considered in conjunction with topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly." 976 F.2d at 720.

The pressing operation, like the coating operations in *General Motors*, did not interfere with item 807.00's prescriptions when performed in isolation. However, when performed prior to ovenbaking, pressing does more than simply impart a temporary smoothness to the fabric. It begins the curing process which, once started, imparts permanent new characteristics to the pants. Thus, the entire curing operation in this case is analogous to the entire finish painting operation in *General Motors*; the court must consider ovenbaking in conjunction with pressing when applying the *Mast* test.

Application of the first *Mast* factor involves comparing (1) the cost of the curing operation relative to the cost of the post-cured fabric component, including, pursuant to *General Motors*, the comparison of Haggar's investment in the curing operation versus its investment in the assembly process; and (2) the time required for curing, relative to the time required for assembly. *General Motors*, 976 F.2d at 719-21.

(i) Cost Comparisons of Curing Relative to the Cost of the Affected Components, and to the Cost of the Assembly Process

Dividing the cost of pressing and baking ($0.0529) by the cost of the fabric components ($3.08) indicates the curing operation constitutes 1.72 percent of the component cost.[1] (Joint Stip. at 2-3.) Further, comparing the cost of curing (again pressing and ovenbaking, $0.0529) against the total operation cost ($0.500) constitutes 10.6 percent. *Id.* The court does not find either figure significant. *See Mast*, 668 F.2d at 506 (finding 15% minor [$0.003 of $0.020 in percentage terms]).

(ii) Capital Investment Comparisons

The court in *General Motors* also found a capital investment determination relevant to the cost analysis. 976 F.2d at 721. Defendant argues that proper analysis under this factor requires the use of replacement costs, as supplied by the parties in their cost stipulations. (Def.'s Post Trial Br. at 21, 39.) According to defendant, if the court instead were to use depreciated costs, the qualification for a duty allowance would vary by the year the merchandise in question would be imported, or by the age of the equipment used on the imported merchandise. *Id.* at 21. Thus similarly-positioned importers might receive disparate treatment for the same operation.

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[1] The parties stipulated that overhead costs of "factory supplies, pressing expense, H & O repair, H & O repair parts, porters, office security guard, boiler maintenance, cook, legal, doctor, severance pay, unemployment, insurance (unemployment and insurance are two separate parts), dues and subscription, telephone, employee benefits, other professional fees, office supplies, janitor supplies, travel, auto expense[s], advertising and building maintenance cannot be allocated to the pants at issue," or to a division of assembly versus nonassembly costs. (Parties' Stip., Tr. at 535.) The court therefore makes *Mast* cost comparisons exclusive of overhead.

Plaintiff argues depreciation costs are proper. (Haggar's Post Trial Reply Br. at 19, 20.) Plaintiff argues Customs' practice has been to permit depreciation of the machinery, as in accordance with generally accepted accounting procedures. (Haggar's Post Trial Br. at 10.) According to plaintiff, the investment cost of the ovens was zero, as the ovens were 25 years old and fully depreciated when they were transferred to Mexico. *Id.* Permitting depreciation, the only remaining equipment for comparison would be the pressing equipment ($430,000), which would constitute 50 percent of assembly capital costs ($857,724). (Joint Stip. at 4) (total capital costs minus pressing & ovenbaking). If the court did not permit the depreciation of the oven to zero, the capital investment of the curing equipment would be $522,808, or 61 percent of the assembly capital costs. *Id.* The court cannot consider either of these figures as minor and finds that these factors weigh against granting a duty allowance under item 807.00.

(iii) Time Comparisons

The Federal Circuit in *General Motors* found "where operations . . . involve significantly automated or non-labor processes (*such as baking*), this factor provides little guidance on whether operations are of a 'minor nature.' " 976 F.2d at 720 (emphasis added). Ovenbaking is an automatic process which accounts for nearly one-third of the total operation time. (Revised Joint Stip. at 1) (dividing 15 minutes ovenbaking time by 42 minutes for total operation). The court, pursuant to *General Motors*, does not address this test here.

(B) Necessity and Logical Relatedness to Assembly

Mast factors 2 and 3 examine respectively whether the challenged operations were so related to assembly that they were necessary to the assembly process, and whether the challenged operations were so related to assembly as to be performed during assembly. *Mast*, 668 F.2d at 506.

The parties have stipulated that "[t]he effect of ovenbaking is to create crease retention and greater surface and seam flatness in the garment, and prevent wrinkling." (Stip. Facts ¶ 55.) These features are unrelated to assembly. The parties in fact have agreed that assembly occurs without the initiation of the curing process—pressing—so it follows the entire curing operation would be similarly unnecessary. (Stip. Facts ¶ 38.) The court finds that ovenbaking and pressing are not necessary, nor related to assembly. (Court's Findings, Tr. at 455, 503, 505-506.)

(C) Economic & Other Practical Considerations

The fourth *Mast* factor examines whether economic and practical considerations dictate that the challenged operations be performed concurrently with assembly. 668 F.2d at 506 n. 7.

Defendant argues that plaintiff cannot present any considerations requiring that curing be conducted concurrently with assembly, because curing does not begin until after assembly is completed. (Def.'s Post Trial Br. at 41-42.) According to defendant, *Mast* and its progeny demonstrate that "concurrently" with assembly only extends to actual joinder. *Id.* at 16 n. 10, 41-42.

The court does not agree with defendant's narrow interpretation of "concurrently." This restrictive interpretation would, in effect, require a showing that ovenbaking must be done during assembly because it is necessary to further assembly. However, this inquiry is already accomplished by the necessity requirement in *Mast*. The legislative history of item 807.00 demonstrates clear Congressional intent to permit duty-free treatment of a component manufactured in the United States if subjected to an operation of a minor nature incidental to the assembly process, whether done before, during or after assembly."

Tariff Schedules Technical Amendments Act of 1965, H.R.Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

The parties agree that, if the pants were packed and shipped to the United States immediately after assembly, but before curing, Haggar would incur additional costs for repacking and reshipping to the distribution centers. (Parties' Stip., Tr. at 545.) Moreover, an additional work shift would have to be added to complete the ovenbaking and pressing at higher labor costs. *Id.* at 547. Mr. Ernie Ramirez, International Accounting Manager for Haggar, also testified that "throughput" time (total time from when the garment is cut to when it is received by the customer) would be increased by 3-4 days, and separating ovenbaking from assembly would result in higher transportation costs, increased production times, the need for additional facility investment, higher handling costs, and additional overhead expenses. (Tr. at 347, 399-402.) Finally, Mr. Frank Bracken, President of Haggar Apparel Co., testified that post-curing immediately after assembly was necessary because there was a risk with post-cured fabric that permanent creases and wrinkles would occur during shipping, and render the product "useless." (Tr. at 39, 49-50.) Although the curing operation does not preclude assembly from occurring, the court finds the curing of the fabric would logically occur at this time to minimize damages and economic costs. The court holds that economics and practicality dictate that Haggar cure its merchandise concurrent with assembly.

The court finds the costs of the curing operation are insignificant as a percentage of the fabricated components and of the entire operation. Moreover, strong economic and practical considerations dictate that curing be performed concurrently with assembly. After balancing the relevant factors, the court finds that the curing operation is "incidental to the assembly process" within the meaning of item 807.00, TSUS, and subheading 9802.00.80, HTSUS.

II. Advancement in Value

Defendant argues that, even if the *Mast* analysis results in a finding that the operation is minor, additional inquiry is necessary to determine whether the imported article has undergone a prohibitory advancement in value. (Def.'s Post Trial Br. at 23-26.) Therefore, according to defendant, the court should consider the importance to Haggar of the crease retention and the greater surface and seam flatness as an additional factor. *Id.*

Defendant's arguments are meritless. Item 807.00 provides that a duty allowance is permissible so long as the merchandise in dispute has not been advanced in value "except by operations incidental to the assembly process." Item 807.00(c), TSUS. Item 807.00 does not prohibit an advancement in value, therefore, so long as the operation in question is incidental to assembly.

III. 19 C.F.R. Section 10.16

Defendant contends 19 C.F.R. § 10.16 (1988) governs the application of item 807.00. Subsection 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article.

19 C.F.R. § 10.16(c) (1988) (1989 version identical).

The court disagrees. Subsection 10.16(c) conflicts with the plain language of item 807.00. Item 807.00 does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the

articles so long as the operation imparting those characteristics was incidental to assembly. Moreover, the Federal Circuit has strongly qualified 19 C.F.R. § 10.16, *see Chrysler Corp. v. United States*, 1996 WL 132263 at *2 (Fed.Cir.1996) (finding the cost comparisons in *General Motors* "determinative" over 19 C.F.R. § 10.16), or has ignored the regulation altogether, *see Mast*, 668 F.2d at 506 (developing factors); *General Motors*, 976 F.2d at 718 (citing, but not applying regulation); *United States v. Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A.1981) (applying *Mast* factors only). Indeed, defendant has recognized pursuant to the court's questioning that these decisions have cast considerable doubt on the regulation's validity. (Def.'s Suppl.Br. at 1-2.)

Finally, although defendant argues that Customs is entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984), the recent decisions in *Crystal Clear Industries v. United States*, 44 F.3d 1001 (Fed.Cir.1995), and *Anval Nyby Powder AB v. United States*, 927 F.Supp. 463 (Ct. Int'l Trade 1996) may have put defendant's assertion into question. *See Crystal Clear*, 44 F.3d at 1003 (declining to apply *Chevron* deference to Customs in routine classification decisions); *see also Anval Nyby Powder AB*, 927 F.Supp. at 469 (finding "court's statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to Customs' statutory constructions.) The court finds the Federal Circuit's test in *General Motors* as determinative.

CONCLUSION

The court in applying the *Mast* factors finds that the curing operation performed on Haggar's Model 245 Presstige men's pants, fabric style 2010, was a minor operation incidental to the assembly process under item 807.00, TSUS and

subheading 9802.00.80, HTSUS. Customs is ordered to allow a duty allowance for the components in issue.

JUDGMENT ORDER

This action having been submitted for decision, after trial and upon due deliberation, in conformity with the decision rendered, it is hereby

ORDERED that Customs grant a duty allowance under TSUS item 807.00 and HTSUS subheading 9802.00.80, for Haggar's Model 245 men's pants, fabric style 2010; and it is further

ORDERED that the action is dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL, CO.,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

Oct. 22, 1997

Before RICH, NEWMAN, AND CLEVENGER, Circuit Judges.

RICH, Circuit Judge

This appeal in a so-called "American-goods-returned" case is from the decision by the United States Court of International Trade of 25 July 1996 in case number 93-06-00343 ordering the United States to grant a duty allowance for the goods in question. We affirm.

BACKGROUND

The merchandise at issue in this case consists of men's and women's permanent-press, wrinkle-free trousers that are assembled in Mexico from resin-impregnated fabric components made in the U.S. Plaintiff-appellee, Haggar Apparel Co. ("Haggar"), sells a line of such garments under the mark PRESSTIGE. There are three types of fabric used to make the PRESSTIGE garments: pre-cured fabrics in which the impregnating resin is cured before assembly into garments; synthetic fabrics which require pressing, but not

curing; and post-cured fabrics that require curing after assembly into garments. While only those garments made with the third type of fabric—the post-cured fabric—are at issue in this case, all of the Haggar PRESSTIGE products are assembled, tagged, and packaged in Mexico for distribution in the U.S. Indeed, except for the brief detour required to cure the post-cured fabric, all of the PRESSTIGE products are processed in the same plants and undergo the same assembly, tagging, and other processing steps.

OPINION

The issue in this case is whether the oven-baking process used to cure Haggar's post-cure fabric is an operation that is "incidental to assembly" under the tariff laws. The issue arises because the tariff provisions provide a partial duty allowance for certain U.S.-made components that are assembled outside the U.S. for return to the U.S. so long as the components are not advanced in value or improved in condition "except [by the actual assembly itself or] by operations [which are] incidental to the assembly process." Item 807.00, Tariff Schedules of the United States (1988) (for pre-1989 entries) and subheading 9802.00.80, Harmonized Tariff Schedule of the United States (1989).

The Court of International Trade, in a thorough opinion by Chief Judge DiCarlo, correctly applied the test set forth in the decision of this court's predecessor court in *United States v. Mast Indus., Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (C.C.P.A.1981), to determine whether ovenbaking is an operation that is incidental to assembly. In so doing, the court began its analysis by properly rejecting as overly restrictive the United States' argument that the term "assembly" means the joinder of two components. Instead, the court properly concluded that certain minor operations are not merely incidental to assembly, but are so integral to the process as to merge with it. The court then diligently applied

the factors applied by this court's predecessor in *Mast*, to analyze the curing operation at issue in this case. After balancing the relevant *Mast* factors, the court correctly concluded that the curing operation is "incidental to the assembly process" within the meaning of the statute.

The court next properly rejected the United States' argument that although "incidental to assembly," the curing process may nonetheless fall outside of the statute's tariff shelter if the process caused a prohibited advancement in value. The court looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.

Finally, the court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed.Cir.1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed.Cir.1997) ("neither this court nor the Court of International Trade defers to Custom's interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]"). Acknowledging the procedural importance of presumptions, the Court of International Trade is nonetheless charged with the duty to "reach the correct decision." *Rollerblade*, 112 F.3d at 484 (quoting 28 U.S.C. § 2643(b)). On appeal, we review the findings of that court—not those of Customs—for clear error; while we decide questions of law *de novo*. *Universal Elecs.*, 112 F.3d at 491.

CONCLUSION

The decision of the Court of International Trade was correct for the reasons stated in its opinion. Therefore, we affirm.

AFFIRMED.

APPENDIX D

[Filed Oct. 19, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-1002

HAGGAR APPAREL CO.,
Plaintiff-Appellee,

v.

THE UNITED STATES
Defendant-Appellant.

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 26, 2000.

For the Court

/s/ Jan Horbaly (A.V.V.)
JAN HORBALY
Clerk

Dated: October 19, 2000